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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39891
)	
v.)	BANNOCK COUNTY NO. CR 2011-
)	13693
)	
GARY L. SCHALL,)	REPLY BRIEF
)	
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK

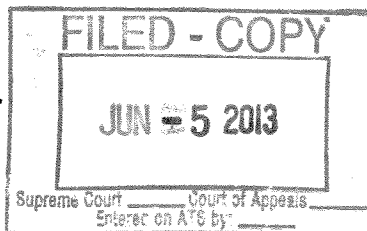
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District Judge

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STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Schall argued that the district court erred when it denied his motion to dismiss based on the magistrate's and the district court's implicit determination that the requirement under I.C. § 18-8005(6), that a foreign DUI conviction must substantially conform to I.C. § 18-8004 in order for it to be used for felony enhancement purposes, is an affirmative defense as opposed to an element of the offense. Since the substantial conformance requirement is an element of the offense, the State's failure to establish that element at the preliminary hearing constitutes reversible error. Mr. Schall also argued, in the alternative, that Mr. Schall's foreign conviction does not substantially conform to I.C. § 18-8004. In response, the State argues that no reversible error occurred because the only true issue on appeal is the legal question of whether Mr. Schall's foreign conviction substantially conforms to I.C. § 18-8004. The State then argues that Mr. Schall's foreign conviction substantially conforms to I.C. § 18-8004.

This brief is necessary to address the State's contention that reversible procedural error did not occur when the magistrate and the district court implicitly determined that the substantial conformance requirement was an affirmative defense, and that the magistrate need not take judicial notice of the Wyoming DUI statute. Contrary to the State's assertion, the State's failure to provide any evidence that Mr. Schall's foreign conviction substantially conforms to I.C. § 18-8004, and the district court's conclusion that it is not the State's burden to do so, constitutes reversible error.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Schall's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it denied Mr. Schall's motion to dismiss because the State failed to establish that Wyoming's DUI statute, Wyoming Statute Section 31-5-322, substantially conforms to Idaho's DUI statute, Idaho Code Section 18-8004, at the preliminary hearing?

ARGUMENT

The District Court Erred When It Denied Mr. Schall's Motion To Dismiss Because The State Failed To Establish At The Preliminary Hearing That Wyoming's DUI Statute, Wyoming Statute Section 31-5-322, Substantially Conforms To Idaho's DUI Statute, Idaho Code Section 18-8004

In its Respondent's Brief, the State implicitly concedes Mr. Schall's argument that the substantial conformance requirement is an element of the felony DUI offense and that it had the burden at the preliminary hearing to establish that Mr. Schall's Wyoming DUI conviction substantially conforms to 18-8004. (Respondent's Brief, pp.4-5.) The State virtually ignores Mr. Schall's contention that this error constitutes reversible error. The only argument provided by the State is as follows:

As an initial matter, because [Mr. Schall's] issue is purely a legal question, it is immaterial which party had the burden of proof at the preliminary hearing; the Court here will exercise free review. Thus [Mr. Schall's] contention that he was erroneously assigned the burden of proof below is not relevant. For the same reason, [Mr. Schall's] argument that the district court erred in concluding that the magistrate need not take judicial notice of the Wyoming DUI statute at the preliminary hearing is of no consequence here. Alternatively, [Mr. Schall] argues that Wyoming DUI laws do not substantially conform to Idaho's as required to apply a felony enhancement under Idaho Code § 18-8004.

(Respondent's Brief, p.4 (citations omitted).)

The error in the State's argument is that it relies on the standard of review applicable to the question of whether Mr. Schall's foreign conviction substantially conforms to I.C. § 18-8004, and disregards the applicable standard of review when a motion to dismiss a magistrate's probable cause determination is addressed on appeal. Since the question of whether Mr. Schall's Wyoming DUI substantially conforms to I.C. § 18-8004 requires comparison between the elements of the Wyoming DUI statute and I.C. § 18-8004, that issue is purely one of statutory construction and the State

accurately identified the standard of review as to that issue as being one of free review.

State v. Schmoll, 144 Idaho 800, 803-804 (Ct. App. 2007).

However, the State ignores the standard of review as to the preliminary question in this appeal, to wit, the standard of review applicable when an appellate court reviews a motion to dismiss for lack of probable cause. As an initial point, when a district court reviews a magistrate's probable cause determination, that review is limited to the record before the magistrate court.

A defendant once held to answer to a criminal charge under this chapter may challenge the sufficiency of evidence educed at the preliminary examination by a motion to dismiss the commitment, signed by the magistrate, or the information filed by the prosecuting attorney. Such motion to dismiss shall be heard by a district judge.

If the district judge finds that the magistrate has held the defendant to answer without reasonable or probable cause to believe that the defendant has committed the crime for which he was held to answer, or finds that no public offense has been committed, he shall dismiss the complaint, commitment or information and order the defendant discharged.

I.C. § 19-815A (emphasis added). When a defendant appeals from an order denying a motion to dismiss based on the magistrate's probable cause determination the following standard of review limits the appellate court's review to the record before the magistrate court at the preliminary hearing:

At a preliminary hearing, the state must prove that a crime was committed and that there is probable cause to believe that the defendant committed the alleged crime. The finding of probable cause must be based upon substantial evidence upon every material element of the offense charged. This test may be satisfied through circumstantial evidence and reasonable inferences to be drawn from that evidence by the committing magistrate. A reviewing court will not substitute its judgment for that of the magistrate as to the weight of the evidence.

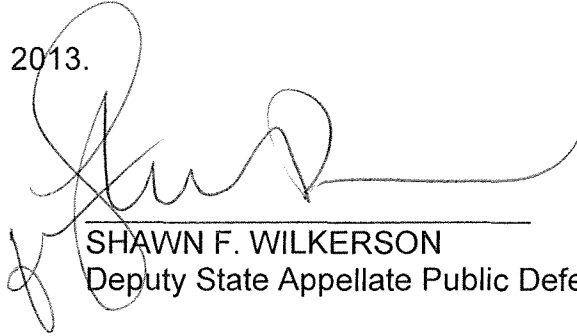
State v. Munhall, 118 Idaho 602, 606 (Ct. App. 1990) (emphasis added); see also *State v. Pole*, 139 Idaho 370, 372 (Ct. App. 2003) (“A reviewing court will not substitute its judgment for that of the magistrate as to the weight of the evidence.”). Under the applicable standard of review, the appellate court looks to see if the record before of the magistrate supports the conclusion that probable cause exists for every element of the offense. If there is no evidence as to one element of the offense, an appellate court must reverse. *Munhall*, 118 Idaho at 606. Contrary to the State’s assertion, before this Court can exercise free review to answer the question of whether the Wyoming DUI statute substantially conforms to I.C. § 18-8004, it must first determine whether there was evidence before the magistrate court upon which the magistrate could have concluded that the Wyoming DUI statute substantially conforms to I.C. § 18-8004. No such evidence was before the magistrate court. (09/13/11 Tr., p.30, L.5 - p.31, L.16.)

In sum, It does not matter that the district court found that the Wyoming DUI statute substantially conforms to I.C. § 18-8004, because the initial issue on review is whether the record before the magistrate is sufficient to support that finding. Since the magistrate refused to take judicial notice of the Wyoming DUI statute, there is nothing in the magistrate’s record to establish whether the Wyoming DUI statute substantially conforms to I.C. § 18-8004. Since there is nothing in the record supporting the existence of an element of the offense, this case must be remanded for further proceedings.

CONCLUSION

Mr. Schall respectfully requests that this Court reverse the district court's order denying his motion to dismiss and remand this case to the district court for further proceedings.

DATED this 5th day of June, 2013.



SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of June, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

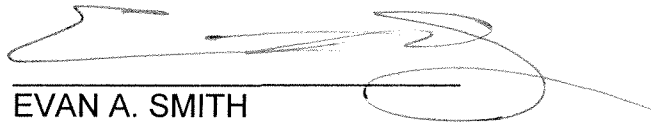
GARY L SCHALL
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STEPHEN DUNN
DISTRICT COURT JUDGE
E-MAILED BRIEF

RANDALL SCHULTHIES
BANNOCK COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

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P.O. BOX 83720
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Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read "Evan A. Smith", is written over a horizontal line.

EVAN A. SMITH
Administrative Assistant

SFW/eas